

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 164
3050712

BETWEEN BRADLEY COOK
 Applicant

AND MINISTRY OF BUSINESS,
 INNOVATION &
 EMPLOYMENT
 Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Bradley Cook, the Applicant
 Miriam Long for the Respondent

Investigation Meeting: On the papers

Submissions [and further None from the Applicant
Information] Received: 15 February 2019 from the Respondent

Date of Determination: 21 March 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 3 December 2018 Bradley Cook was advised by letter from the Inland Revenue Department (IRD) that his application for paid parental leave (PPL) was declined on the ground that he did not stop working on the date he became the primary carer of his child. The decision was subsequently affirmed by the Ministry of Business, Innovation and Employment (MBIE) on 21 December 2018.

[2] Mr Cook applies to the Authority for a review of MBIE's decision and for orders that he is eligible for PPL under the Parental Leave and Employment Protection Act 1987 (the Act).

[3] MBIE denies Mr Cook's claim. It maintains he is not entitled to PPL because he did not take parental leave, or otherwise stop working, on 23 October 2018, being the date on which the Family Court made a parenting order in his favour and therefore the date he became the primary carer.

[4] As permitted by 174E of the Employment Relations Act 2000 this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

Relevant background facts

[5] The facts are not in dispute.

[6] Mr Cook was employed at the time he made an application for PPL.

[7] The child for whom parental leave was sought was informally in Mr Cook and his partner's care. On 23 October 2018 the Family Court made orders, including an interim parenting order, in favour of Mr Cook and his partner in relation to the child. The orders were sealed on 14 November 2018 and Mr Cook received them the same day.

[8] On 5 November 2018, Mr Cook resigned permanently from his job to become the full time caregiver for the child. He gave 6 weeks' notice in accordance with the terms of his employment agreement. He was required to work out his full notice period because of the nature and seniority of his position. His last day of work was 21 December 2018.

[9] On 16 November 2018 Mr Cook applied to the IRD for PPL. IRD declined the application and then referred it to MBIE to review its decision. MBIE declined the PPL application on the basis that Mr Cook did take parental leave, or otherwise stop working, from the date he became the primary carer on 23 October 2018 but continued working until 21 December 2018.

The Applicable Law

[10] Section 71ZB of the Act enables an affected employee to apply to the Employment Relations Authority for a review of decisions made by MBIE relating to

that person's entitlement to a parental leave payment. Under this section the Authority has a wide discretion to confirm, modify or reverse MBIE's decision.

[11] There are several relevant sections of the Act that apply in this case.

[12] Section 71A sets out the purpose of Part 7A, payment for parental leave. The purpose is to entitle certain persons who become the primary carer in respect of a child and who stop working, or take a period of leave, to up to 22 weeks of parental leave payments out of public money.

[13] Section 7 defines who may be a "primary carer". This includes a person, other than the biological mother or her spouse or partner, who takes permanent primary responsibility for the care, development and upbringing for a child who is under the age of 6 years.

[14] Section 71D establishes when a person is entitled to a parental leave payment. It provides:

- (1) A person is entitled to a parental leave payment under this Part, if—
 - (a) the person is—
 - (i) an eligible employee or an eligible self-employed person; or
 - (ii) a person to whom all or part of an entitlement to a parental leave payment is transferred under section 71E; or
 - (iii) a person who succeeds to all or part of an entitlement to a parental leave payment under section 72B; and
 - (b) during the period in relation to which the person receives parental leave payments, the person—
 - (i) is not employed or self-employed; or
 - (ii) takes parental leave from their employment or self-employment.
- (2) Despite subsection (1), a person who becomes the primary carer in respect of a child who is under the age of 6 years is not entitled to parental leave payments in respect of that child if—
 - (a) the person has previously received parental leave payments in respect of that child; or
 - (b) the person's spouse or partner has previously received parental leave payments in respect of that child (unless the person's entitlement arises from a transfer under section 71E or by succession under section 72B).

- (3) This section is subject to sections 71F to 71IA (restrictions on parental leave payments and making an application for payment).

[15] An eligible employee is defined at s 71CA as a person who is the primary carer in respect of a child and meets the parental leave payment threshold test.

[16] Section 71K identifies the commencement date for parental leave payments as:

- (1) A parental leave payment in respect of a child is payable for a period that begins—
- (a) in the case of a child born to the person or to the person’s spouse or partner, on the earlier of—
- (i) the date the person commences parental leave; and
- (ii) the date of confinement; and
- (b) in any other case, on the date on which the person becomes the primary carer in respect of the child.
- (2) Despite subsection (1),—
- (a) an employee who takes a period of paid leave at the start of his or her parental leave period may elect to start his or her parental leave payment period on the day after the date on which that period of paid leave ends:
- (b) if a person becomes entitled to a preterm baby payment under section 71DA(1) and that person’s parental leave payment period has not begun, subsection (3) applies instead of subsection (1).
- (3) If this subsection applies, the period in relation to which a parental leave payment is payable to the person in respect of the child does not begin until the earlier of—
- (a) the date the person commences parental leave; and
- (b) the original expected date of delivery, had the child not been born prematurely.

[17] PPL must be taken in one continuous period from the date parental leave begins for a period not exceeding 22 weeks.¹

Analysis

[18] It is agreed that Mr Cook satisfies the requirements of s 71D(1)(a). He is an “eligible employee” for parental leave payments being the primary carer of the child and meets the parental leave payment threshold test.² However, to be entitled to a

¹ Sections 9(1) and 71J of the Parental Leave and Employment Protection Act 1987.

² Section 2BA of the Parental Leave and Employment Protection Act 1987.

parental leave payment he must also show that during the period in relation to which he receives parental leave payments he was either not employed or was taking parental leave from his employment.

[19] In accordance with s 71K, the commencement date for any entitlement to paid parental leave was the day Mr Cook became the child's primary carer, i.e. on 23 October 2018. The end date was 22 weeks thereafter i.e. 26 March 2019.

Entitlement for payment for period 23 October 2018 to 21 December 2018

[20] Mr Cook was employed, and did not take parental leave, during the period from 23 October to 21 December 2018. He therefore does not meet the criteria in s 71D(1)(b) for payment of parental leave under the Act.

[21] I find Mr Cook was not entitled to receive parental leave payments for the period from 23 October to 21 December 2018.

Entitlement for payment for period 22 December 2018 to 26 March 2019

[22] Mr Cook was not employed for the period 22 December 2018 to 26 March 2019. From 22 December 2018 Mr Cook met all of the requirements under s 71D so as to entitle him to a parental leave payment under the Act from that date until 26 March 2019.

[23] I find Mr Cook is entitled to receive parental leave payments for the period from 22 December 2018 until 26 March 2019 unless he returns to work during this period.

Outcome

[24] I am satisfied, in the circumstances of this case, that the decision of MBIE ought to be modified and relief granted to Mr Cook.

[25] Mr Cook is entitled to parental leave payments for the period from 22 December 2018 to 26 March 2019 unless he returns to work during this period. Payment must be made within 14 days of the date of this determination.

Jenni-Maree Trotman
Member of the Employment Relations Authority